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No. 90-249

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

RONALD LEE FEE AND WIFE,
NANCY LEE FEE, INDIVIDUALLY
AND AS NEXT FRIENDS OF
TRACY JOHN FEE, A MINOR,

Petitioners,

vs.

JOSEPH MILTON HERNDON,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

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QUESTION PRESENTED

Whether substantive due process is implicated in public school corporal punishment where the state provides civil and criminal remedies and adequate post-punishment relief, and therefore no arbitrary state action exists.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

OPINION BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

COUNTERSTATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 4

1. THE OPINION BELOW AND THE RECORD DO NOT RAISE THE QUESTION PRESENTED IN THE PETITION 4

2. A SCHOOL OFFICIAL'S DEPARTURE FROM DISCIPLINARY NORMS DEFINED BY STATUTE OR COMMON LAW DOES NOT RISE TO THE LEVEL OF A SUBSTANTIVE DUE PROCESS VIOLATION 7

3. RESPONDENT WOULD BE ENTITLED TO QUALIFIED IMMUNITY IN ANY EVENT 10

4. THE RIGHTS OF ARRESTEES, DETAINEES, AND PRISONERS ARE NOT AT ISSUE 11

CONCLUSION 11

TABLE OF AUTHORITIES

Page

CASES

Adams Fruit Co., Inc. v. Barrett, ___ U.S. ___, 110 S.Ct. 1384 (1990) 6

Anderson v. Creighton, ___ U.S. ___, 107 S.Ct. 3034 (1987) 10

Coleman v. Franklin Parish School Board, 702 F.2d 74 (5th Cir. 1983) 10

Cunningham v. Beavers, 858 F.2d 269 (5th Cir. 1988), *cert. denied*, 109 S.Ct. 1343 (1989) 5

Daniels v. Williams, 474 U.S. 327 (1986) 7

Davidson v. Cannon, 474 U.S. 344 (1986) 7

Graham v. Connor, ___ U.S. ___, 109 S.Ct. 1865 (1989) 11

Ingraham v. Wright, 525 F.2d 909 (5th Cir. 1976) (en banc), *aff'd*, 430 U.S. 651 (1977) 6, 7, 8, 9, 10

Woodard v. Los Fresnos I.S.D., 732 F.2d 1243 (5th Cir. 1984) 5, 10

Zinermon v. Burch, ___ U.S. ___, 110 S.Ct. 975 (1990) 6

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The Respondent, Joseph Milton Herndon, respectfully requests this Court deny the Petition for Writ of Certiorari, seeking partial review of the Fifth Circuit's opinion.

OPINION BELOW

The opinion of the Fifth Circuit Court of Appeals is reported at 900 F.2d 804 and is reproduced in the Appendix to the Petition at pages la-13a. Citation will be to the Appendix.

JURISDICTION

The jurisdictional basis of this Court is adequately set forth in the Petition for Writ of Certiorari.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The statutes and constitutional provisions at issue are sufficiently set forth in the Petition.

COUNTERSTATEMENT OF THE CASE

In September, 1985, Tracy Fee was enrolled in Dunbar Middle School in Dickinson, Texas. He was placed in a behavioral adjustment class because he had a history of emotional and psychiatric problems. (Tr. 32, pp. 81-84).

On October 8, 1985, Tracy refused to obey his teacher, Suzanne Lahr. Tracy became upset in the classroom and struck his head on his desk top. After Tracy persisted in

ignoring his teacher and refused to respond to her questions, Ms. Lahr escorted Tracy to the office of the principal, Respondent Joseph Herndon. Ms. Lahr remained in the office to witness any disciplinary action.

Respondent advised Tracy he would receive three swats for misbehavior, a discipline option Tracy's parents had authorized. (Tr. 32, p. 104). Tracy threw himself on the floor and began kicking and squirming to avoid the spanking. Respondent held Tracy's legs down and managed to administer three swats on Tracy's buttocks. (Tr. 32, pp. 54-76). Tracy's teacher, Ms. Lahr, although present, did not observe any abuse or excessive force. (Tr. 32, pp. 54-59). Respondent later completed a report to the superintendent concerning the disciplinary action. (Record excerpts below, p. 69).

Ms. Lahr escorted Tracy to the school bus for his ride home. At home, Tracy began watching television and did not mention the spanking to his father. (Record excerpts below, p. 105). When Tracy's mother arrived home, Tracy told her of the spanking. Tracy's mother notified authorities, who took photographs of Tracy and noted bruises on his back, right arm, and right buttock. Tracy was taken to an emergency room where he was seen and released.

Petitioners sued Respondent, Ms. Lahr, the school district, its superintendent, and the board of trustees in state court. The case was removed to the United States District Court for the Southern District of Texas.

Respondent filed a motion for summary judgment. Consistent with Fifth Circuit doctrine, the District Court allowed Petitioners to amend their pleadings and state their "best case". (Appendix, p. 21a).

Respondent then moved for summary judgment on the amended complaint. The District Court concluded the amended complaint was factually insufficient and stated only a claim in negligence, which could not establish a constitutional violation. (Appendix, p. 17a). The Court also concluded the post-punishment remedy provided by Texas law afforded Petitioners all the process constitutionally required. The substantive due process claims were therefore dismissed.

Petitioners perfected an appeal to the Court of Appeals for the Fifth Circuit.

The Fifth Circuit affirmed dismissal of the substantive due process claims. The Court adhered to its rule that no arbitrary action exists where states impose limitations upon corporal punishment and provide adequate remedies for departures from those limitations. The Fifth Circuit held that states which affirmatively prescribe and remedy mistreatment of students do not act arbitrarily, a necessary predicate for substantive due process relief.

REASONS FOR DENYING THE WRIT

1. THE OPINION BELOW AND THE RECORD DO NOT RAISE THE QUESTION PRESENTED IN THE PETITION.

Petitioners present this Court with a question based on incorrect assumptions. They erroneously assume the Fifth Circuit ruling below conflicts with rulings of four other circuits. Even so, they beg the question which should be before this Court: Was the ruling of the Fifth Circuit correct?

Petitioners attempt, by overstating the ruling below, to broaden it to the point of conflict with prior rulings of other circuit courts. The ruling of the Fifth Circuit below sets out clear parameters limiting the scope of its holding that *Cunningham v. Beavers*, 858 F.2d 269 (5th Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 1343 (1989), is dispositive of Petitioners' claims. In *Cunningham* the Fifth Circuit affirmed dismissal of due process claims where Texas had provided limits on the use of corporal punishment by statutes and common law. In the decision below, the Fifth Circuit focused on the applicability of *Cunningham*:

> [I]t is important to note that the *Cunningham* rule has been crafted to operate in the narrow context of student discipline administered within the public schools of states that authorize only reasonable discipline and, further, provide post-punishment relief for departures from its law.

Appendix, p. 10a. As to general substantive due process concerns, the Fifth Circuit reasserted its statement in *Woodard v. Los Fresnos I.S.D.* that corporal punishment in public schools "is a deprivation of substantive due process when it is arbitrary, capricious, or wholly unrelated to the legitimate state goal of maintaining an atmosphere conducive to learning". 732 F.2d 1243, 1246 (5th Cir. 1984).

The decision of the Fifth Circuit, therefore, is limited to the particular context identified in *Cunningham*. By ignoring that limitation, Petitioners attribute to the court below an absolute rejection of substantive due process concerns. On the contrary, the Court found it unnecessary to address general due process issues, given the pleadings and facts of this case. (Appendix, p. 10a). Thus, this

case does not present an opportunity to review the substantive due process issue urged by Petitioners, and does not qualify for review by this Court.

For the same reasons, a decisional conflict with the Courts of Appeals for the Third, Fourth, Eighth and Tenth Circuits does not exist. Those courts have found that at some point, corporal punishment may violate substantive due process rights. The decision of the Fifth Circuit is not inconsistent, but is limited to the facts and the pleadings.

The ruling below does not contradict decisions of this Court, as Petitioners suggest. *Zinermon v. Burch*, ___ U.S. ___, 110 S.Ct. 975 (1990), for example, does not bring into conflict the ruling below. In *Zinermon*, this Court granted certiorari to consider the proper scope of the *Parratt* rule. This Court held only that Burch had stated a claim under section 1983 for a violation of his procedural due process rights. Substantive due process was not at issue. Likewise, the Fifth Circuit's opinion below is not in opposition with *Adams Fruit Co., Inc. v. Barrett*, ___ U.S. ___, 110 S.Ct. 1384 (1990). *Barrett* involved a "reverse preemption" argument concerning an exclusivity provision of a state workers' compensation law, and a federal worker protection act.

This Court in *Ingraham v. Wright*, 430 U.S. 651 (1977), affirming the *en banc* Fifth Circuit, did not address substantive due process. Rather, it refused certiorari as to whether "the infliction of severe corporal punishment upon public school students [is] arbitrary, capricious and unrelated to achieving any legitimate educational purpose and therefore violative of the due process clause of

the Fourteenth Amendment". *Id.* at 659, n.12. The opinion, therefore, cannot be the basis of any alleged decisional conflict meriting this Court's review.

Finally, the judgment below may be limited to the pleadings, as recognized by the District Court. After considering Respondent's motion for summary judgment, the Court ordered Petitioners to amend their complaint and "plead their best case in accordance with the heightened pleading requirements required (sic) of section 1983 claims". (Appendix, p. 21a). Following Respondent's reurging of his motion, the District Court concluded Petitioners' amended complaint still lacked the necessary factual specificity to state a claim and alleged only negligence, which was insufficient to establish a constitutional violation. *Davidson v. Cannon*, 474 U.S. 344, 346 (1986); *Daniels v. Williams*, 474 U.S. 327, 328 (1986). (Appendix, p. 17a). Petitioners have not alleged facts supporting a claim against Respondent under 42 U.S.C. § 1983. Petitioners' defective pleadings prevent granting them relief and, therefore, preclude review by this Court.

2. A SCHOOL OFFICIAL'S DEPARTURE FROM DISCIPLINARY NORMS DEFINED BY STATUTE OR COMMON LAW DOES NOT RISE TO THE LEVEL OF A SUBSTANTIVE DUE PROCESS VIOLATION.

The Fifth Circuit's decision below reaffirms its settled refusal to inquire into individual instances of school discipline. In *Ingraham v. Wright*, 430 U.S. 651 (1977), this Court affirmed an *en banc* Fifth Circuit holding that procedural due process interests in corporal punishment were satisfied by traditional common law remedies. *Id.* at 673. This Court had denied certiorari to consider whether

severe corporal punishment was arbitrary, capricious, or unrelated to a legitimate educational purpose. *Id.* at 659, n.12. Not reviewed, therefore, was the Fifth Circuit's conclusion that it is

> a misuse of our judicial powers to determine, for example, whether a teacher has acted arbitrarily in paddling a particular child for certain behavior or whether in a particular instance of misconduct five licks would have been a more appropriate punishment than ten licks. We note again the possibility of a civil or criminal action in state court against a teacher who has excessively punished a child.
>
> *Ingraham v. Wright*, 525 F.2d 909, 917 (5th Cir. 1976) (en banc).

In addition to limiting its review to procedural due process and Eighth Amendment concerns, this Court declined the invitation to participate in policy decisions concerning school discipline.

> Assessment of the need for, and the appropriate means of maintaining, school discipline is committed generally to the discretion of school authorities subject to state law. "[T]he Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools". *Tinker v. Des Moines School District*, 393 U.S. 503, 507, 89 S.Ct. 733, 737, 21 L. Ed. 2d 731 (1969).

Ingraham, 430 U.S. at 681-82. This Court found a historical and contemporary approval by states of reasonable corporal punishment, *id.* at 663, and thus considered a child's liberty interest subject to historical limitations. *Id.* at 675. In summary, this Court described the issue of

school discipline as "a legislative judgment, rooted in history, and reaffirmed in the laws of many States". *Id.* at 681.

The Fifth Circuit's decision below is consistent with the sensitivity of this Court to matters of public policy in school discipline. Specifically, the Fifth Circuit found "no constitutional warrant to usurp classroom discipline where states, like Texas, have taken affirmative steps to protect their students from overzealous disciplinarians". (Appendix at p. 9a).

This Court in *Ingraham* found the practice of corporal punishment in schools was recognized in the common law of most states. The Court described those state laws as a balance between a student's interest in personal security and the necessity of limited corporal punishment in education. This Court concluded "there can be no deprivation of *substantive rights* as long as disciplinary corporal punishment is within the limits of the common-law privilege". *Id.* at 676 (emphasis added).

The Fifth Circuit has held corporal punishment in concept is not arbitrary, capricious, or wholly unrelated to the legitimate purpose of determining educational policy. *Ingraham*, 525 F.2d 909, 916 (5th Cir. 1976) (en banc), *aff'd on other grounds*, 430 U.S. 651 (1977). The Fifth Circuit has also recognized the adequacy of Texas common law remedies and post-punishment relief for departures from reasonable use of corporal punishment. (Appendix, p. 7a-8a & nn.3-4). Given the existence of "civil and criminal laws to prescribe educators from abusing their charges," and "adequate post-punishment relief in favor of students," (Appendix at p. 11a), the Fifth Circuit correctly

held no substantive due process concerns are implicated by the discipline administered to Tracy Fee.

3. RESPONDENT WOULD BE ENTITLED TO QUALIFIED IMMUNITY IN ANY EVENT.

In his Answer, the Motion for Summary Judgment, and in the Court below, Respondent urged the defense of qualified immunity. The Fifth Circuit did not address the issue of Respondent's immunity from damages since Petitioners did not state a viable section 1983 claim. Had Petitioners stated a substantive due process claim, Respondent would have been entitled to immunity.

Respondent's qualified immunity would turn on the reasonableness of his actions in light of the legal rules clearly established in 1985. *Anderson v. Creighton*, ___ U.S. ___, 107 S.Ct. 3034, 3038 (1987).

The law was not clearly established in 1985 that Respondent's act of punishing Tracy Fee would violate a substantive due process right. In fact, the clearly established law in the Fifth Circuit was to the contrary: Respondent's actions did not violate a due process right. *Woodard v. Los Fresnos I.S.D.*, 732 F.2d 1243 (5th Cir. 1984); *Coleman v. Franklin Parish School Board*, 702 F.2d 74 (5th Cir. 1983); *Ingraham v. Wright*, 525 F.2d 909 (5th Cir. 1976) (en banc), *aff'd on other grounds*, 430 U.S. 651 (1977).

This Court has held official action is protected by qualified immunity unless its unlawfulness is apparent in the light of preexisting law. *Anderson* at 3039. The preexisting legal rules in 1985 established that Respondent's acts were lawful. That being so, Respondent could not be

personally liable for those acts. A judgment below for Respondent is therefore consistent with the objective legal reasonableness of his conduct.

4. THE RIGHTS OF ARRESTEES, DETAINEES, AND PRISONERS ARE NOT AT ISSUE.

Petitioners' final argument for granting the writ involves the protections of the Eighth and Fourth Amendments of the Bill of Rights. *E.g., Graham v. Connor*, ___ U.S. ___, 109 S.Ct. 1865, 1871 (1989) (holding claim of excessive force during arrest should be analyzed under Fourth Amendment). The Fifth Circuit Court of Appeals correctly held the Petitioners' authority was distinguishable. None of the cases urged are premised on the substantive protections of the Fourteenth Amendment's due process clause. (Appendix, p. 10a).

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

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